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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1231

PHILIP FRIED AND GEORGE NEARY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 229–255) are not yet reported; there was no dissent, however, on the points raised by the petition for a writ of certiorari in this proceeding. The opinion of Judge Rifkind in the district court (R. 214–224) is reported at 68 F. Supp. 961.

JURISDICTION

The judgment of the circuit court of appeals was entered February 25, 1947 (R. 255–256), and

a petition for rehearing (R. 257–262) was denied March 12, 1947 (R. 263). On March 25, 1947, an order was entered by Mr. Justice Jackson extending through April 11, 1947, the time for filing the petition (R. 264). The petition for a writ of certiorari was filed April 11, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is whether petitioner Neary intelligently and competently consented to the search and seizure which was made as an incident to his arrest.

RULE INVOLVED

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

* * * * *

> (e) *Motion for Return of Property and to Suppress Evidence.*—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the

grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On October 16, 1946, petitioner Fried applied to the United States District Court for the Southern District of New York, both on behalf of himself and his employees, for an order directing the suppression and return of various books and records alleged to have been illegally seized from him and directing the supression of all information disclosed and admissions made to investigating agents by petitioner Fried and his employees (R. 3–22). An order to show cause issued (R. 2–3), and the Government filed answering affidavits opposing the petition and requesting, in view of the sharp disagreement in the affidavits of the parties as to the facts, that a hearing be had in open court (R. 22–45).

The matter came on for hearing before Judge Rifkind, who declined to hear evidence on the application to suppress the confessions and dismissed this aspect of the petition (R. 45–46, 214–219).[1] Evidence was adduced by both sides on the issue of the legality of the search and seizure.

It was established that petitioners are connected[2] with the Special Formula Chemical Company, a firm which manufactures rubber cement in New York City (R. 46). On August 21, 1946, an agent of the Federal Bureau of Investigation filed a complaint with the United States Com-

[1] The recitation of facts in the petition for a writ of certiorari (Pet. 4), showing the events after the search and seizure is based solely on the affidavits which were filed in support of Fried's application in the district court. That the affidavits are abundantly extravagant in describing the events which occurred is illustrated by one example which was inquired into in the hearing in the district court. Petitioner Neary's affidavit states (R. 11–12) that on September 17, when the arrests were made, "20 to 25 F. B. I. men" entered the plant and offices and "I noted that many of the men were armed, with pistols in holsters, and some held their hands on the handles of their guns." Under cross-examination at the hearing Neary testified (R. 105–107) that "I saw only one gun, but I saw two people with their hands on their hips" (R. 107). Special agent Cox testified that fifteen agents originally came to the plant, but eight left within fifteen or twenty minutes after making the arrests (R. 124), and that he did not observe any agent draw his gun or with his hand on his gun during the entire episode (R. 129).

[2] There is a factual dispute whether the firm was solely owned by petitioner Fried or whether Fried and Neary were partners (see *infra*, pp. 15–17).

missioner alleging that petitioners and others, knowing it to have been stolen, wilfully had in their possession 256 bales of crude rubber which had been stolen from a foreign shipment. Warrants issued for the arrest of the persons named. (See R. 219–220.)

On September 17, 1946, the warrants were executed. Petitioner Fried was arrested at his home (see R. 124, 4), and petitioner Neary and the others were arrested at the office and plant of the Special Formula Chemical Company (R. 123–124). As an incident to the arrests the plant and its books and records were searched and a quantity of rubber and various books and records were seized. At the time of the search and seizure petitioner Neary signed a document consenting to the search and seizure in the following terms (Gov. Ex. 1, R. 213):

> I, George Neary, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize Flemming L. Liggitt, and Eldred Wesley Cox, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of the building located at 400 West 219th St., New York City, N. Y. These agents are authorized by me to take from my residence any

letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

(Signed) GEORGE NEARY.

Witnesses:

(Signed) FLEMMING L. LIGGITT,
F. B. I., N. Y. C.

(Signed) ELDRED W. COX,
F. B. I., N. Y. C., 9/17/46.

The principal question presented by the petition for a writ of certiorari is whether the consent was freely given by petitioner Neary with understanding of its significance. Directed to this issue, the facts may be briefly summarized as follows:

On June 20, 1946, F. B. I. agents Cox and Wohl appeared at the plant of the Special Formula Rubber Company, but they were unable to locate either petitioner Fried or petitioner Neary. That night petitioners and others were at the plant all night, petitioner Neary having explained to an employee that the F. B. I. was going to inspect the plant the next day (R. 205–206, 81–82). On the following day, the agents returned to the plant and informed petitioner Fried that "we were inspecting various rubber consumers in the New York area and that we would appreciate an opportunity to go through his plant and satisfy ourselves that none of the

hijacked rubber was there" (R. 120–121). Petitioner Fried replied that "the plant was open for inspection at any time, they had nothing there that they desired to conceal" (R. 121). A fruitless search of the plant was made and upon its conclusion petitioner Fried told the agents "that any time we desired to look through his plant we should feel free to come and he would be happy to see that we went through the plant" (R. 121). Petitioner Neary was not present, but he was apprised of the search (R. 82).

On September 17, 1946, special agent Cox and fourteen other F. B. I. agents proceeded to the office and plant of the Special Formula Chemical Company, arriving between 4:20 and 4:30 p. m., to execute the warrant which previously had been issued. Petitioner Neary was immediately placed under arrest by Cox, and other agents proceeded to arrest the other persons named in the warrants. Within fifteen or twenty minutes six of the F. B. I. agents had left the plant with the persons—other than Neary—they had arrested there and two others had proceeded to petitioner Fried's home where he was taken into custody. Seven agents remained at the plant. (R. 122–124, 4.) After a quick survey of the plant to determine whether any of the stolen rubber was there (R. 123, 149), special agent Cox returned to Neary's office and asked him: "Mr. Neary, what is your attitude to us making these arrests in this plant and possibly

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examining the premises?" Neary replied: "We have nothing to conceal here and I want you to search the plant and find that out for yourself." (R. 125.)

With Neary accompanying them, an hour-long search of the plant was made. During the search two bales of rubber similar to the stolen rubber were found and special agent Cox told Neary that if he had no objection they would like to take the two bales and some samples of scrap rubber. Neary consented on condition that the rubber be returned if it was found to have no connection with the theft. (R. 126–127.)[3]

Upon completion of the inspection of the plant Neary returned to his office, and it was at this juncture that the consent to search form (*supra*, pp. 5–6) was signed. Special agent Liggitt testified (R. 161–162): "I took the 'consents' and asked him to read them and told him that they were 'consents to search' and to take certain items if they were discovered to be pertinent to the investigation. I told him that I was going to ask him to sign it, that I had filled in the address of the premises there. And I told him that he didn't have to sign it, and that he didn't have to give his consent in this manner, and that if he is disposed to sign it we wanted him to sign it." Petitioner Neary stated that he was willing to sign the con-

[3] It subsequently was returned, as were various books and records (R. 144).

sent form (R. 162). Liggitt asked Cox to come in and witness the signing. Cox testified that when he entered the office Neary was looking at the consent forms and that he had a pen in his hand "as though he were going to sign them" (R. 130). Cox also explained to Neary the significance of the consent forms and Neary replied that he understood and was willing to sign them (R. 130, 146, 169). And he did sign two identical forms (R. 130), which authorized the agents to search the building and to seize letters, papers, materials or other property (*supra*, p. 6).

After the written consent form was signed, a search of the office was conducted and books and records of the firm were examined. Petitioner Neary assisted the agents; on one occasion he located a book (R. 182) and on another he telephoned the firm's bookkeeper in an effort to ascertain the combination to a safe which was locked (R. 57, 115). The search was completed at between 7:00 and 7:30 p. m., and various books and records were seized (R. 132). Neary was shown the records which the agents were taking and an itemized list of them (R. 133, 190; Gov. Ex. 2, R. 214). Upon leaving the plant in custody of the special agents Neary instructed an employee to contact a specified attorney for him (R. 135), and this was done (R. 205).

On the following day two special agents returned to the firm's office and requested the book-

keeper to discuss with an F. B. I. accountant, at his office, certain entries in the books. In response to a question whether she had any of the records of purchases the bookkeper produced the journal and accounts payable ledger, which the agents took with them. (R. 116.)

Neary's testimony as to the circumstances under which he signed the consent to search differs in several respects from that of the F. B. I. agents. He testified that upon his arrest, he requested permission to contact an attorney, but this was refused (R. 52). According to his version, he submitted to the demands of the special agents and accompanied them through the plant (R. 55). The plant and the office were both searched and the various items were seized. Then, according to Neary, shortly before 7:30 p. m., when the search and seizure had been completed (R. 59), special agent Liggitt said: "I forgot something," and then tendered the consent to search forms to Neary with a request that he sign them (R. 92). Neary testified that he signed the forms without reading them: "I was afraid not to sign it. I thought I had to sign it. He told me I had to sign it because he did not have a warrant" (R. 92). He understood that the consent form authorized the agents to seize the various books and records which were taken (R. 93).

The district court concluded that petitioner Neary had freely and intelligently consented to

the search and seizure and it accordingly denied the motion to suppress the seized documents (R. 225). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the order as to the motion to suppress the books and records was affirmed, but the part of the court's order dismissing the petition to suppress the confessions (see *supra*, p. 4) was reversed. The court held that if the confessions were obtained in derogation of the confessor's constitutional rights, the district court had power to suppress the confessions. Judge Augustus Hand dissented on this point. (R. 229–255.)

ARGUMENT

The petition for a writ of certiorari seeks review of that part of the judgment of the circuit court of appeals which affirmed the order of the district court refusing to suppress for use as evidence the seized books and records. For the reasons set forth below, we oppose the granting of this petition. We shall shortly file a cross-petition for a writ of certiorari seeking review of that part of the Second Circuit's judgment which holds that a district court may suppress a confession even before indictment has been returned and which, therefore, remands the case to the district court for hearing on the circumstances under which the confessions were obtained.

1. The circuit court of appeals held (R. 237; see also R. 253) that substantial testimony sus-

tains the conclusions of the district court (R. 224) that "neither fear nor submissiveness induced the undenied consent, but that experience and a motive to give the appearance of innocence, in the security in which he believed himself to be, combined to induce Nierenberg [Neary] to give actual and voluntary consent to the search." Petitioners seek to avoid this view of the facts by arguing that the consent was given after Neary had been arrested on a warrant which turned out to be invalid and after, he claims, he was denied permission to seek an attorney.[4] But, of course, the admitted invalidity of the warrant bears no causal relation to the consent that was given. And if, as Judge Rifkind held, petitioner Neary freely consented to the search and seizure in an effort to display a "we have nothing to hide" attitude fully expecting that nothing incriminating would be found, the consent is not vitiated because he did not have an attorney present at the time. Cf. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269.

The crucial question is whether the admitted consent which was obtained after Neary had been

[4] Neary testified that after he was placed under arrest he asked special agent Cox "if I could use the telephone and call a lawyer." According to Neary, Cox replied: "Never mind your lawyer now. You will have plenty of questions to answer before you call a lawyer." (R. 52.) In his affidavit in opposition to the petition in the district court Cox denied that he or anyone in his presence made such a statement (R. 27).

placed under arrest was freely given or whether it was extracted from him by methods inconsistent with the constitutional guarantees. The short of the matter is that with knowledge of all the facts upon which petitioners rely, Judge Rifkind found himself compelled to reject the view of the evidence which petitioners urge, notwithstanding that at the outset, on the basis of the affidavits alone, he would have held for petitioners (see R. 223). In our view, Judge Rifkind's opinion is a full and complete answer to the arguments petitioners now urge. In enumerating the reasons why he concluded that Neary had freely consented to the search and seizure, the opinion points out (R. 223–224) that—

> (1) Nierenberg is the general manager of Special Formula Chemical Company. His earnings in 1945 from that enterprise were $20,000. He is also a co-owner of another business enterprise. I mention these facts to indicate that he is not a poor, illiterate, uninformed person, but a citizen of substance and means. He gave every impression of self-confidence, alertness, competency. He is quite the opposite of the cartoonist's representation of The Timid Soul. He is a man of affairs, accustomed to deal with persons in authority and not at all overawed by the badge of office. He conducted himself militantly and skilfully during his cross-examination.

(2) He testified falsely on some matters, and, in at least one instance, I am convinced that he did so wilfully—in the matter of his foreknowledge of official inspection of the plant in June, 1946. His previous conviction for forgery does not aid his credibility.

(3) In June, 1946, Special Formula Chemical Company had been searched by FBI agents, with the consent of Fried, and nothing of an incriminating nature had been discovered.

(4) Nierenberg felt entirely secure in consenting to a search, as there was in fact no stolen rubber on the premises, and the books revealed no acquisition of such rubber as had been stolen. He undoubtedly believed that the exhibition of an attitude of cooperation and of willingness to prove that "We have nothing to hide" would lead to the same satisfactory result as the June investigation. It is significant that the petitioners did not call Fried to contradict the testimony of Agent Cox, that during the June inspection Fried had said "that the plant was open for inspection at any time; that they had nothing there that they desired to conceal. * * * That any time we desired to look through his plant we should feel free to come and he would be happy to see that we went through the plant."

Petitioners do not deny that there is ample basis in the record for these conclusions. Two courts having evaluated the evidence, we submit that

there is no occasion for further review of it by this Court.

2. Petitioners also urge (Pet. 16–17) that Neary had no authority to authorize the search and seizure. We submit that the evidence permits the conclusion either that Neary was a partner in the firm or that he was a responsible official of the firm; in either event he had ample authority to give consent.

Neary testified on direct examination that the Special Formula Chemical Company is a sole proprietorship owned by petitioner Fried; that he is an employee who functions as sales manager; that he shares an office with Fried and another official of the firm (R. 50); that his compensation consists of one-half of the profits; that he did not contribute capital to the business, does not sign checks and does not share in any losses; and that he is a partner with Fried in another business. (R. 46–48.) On cross-examination, Neary testified that his functions consisted of doing everything that is necessary for the good of the firm (R. 63); that he hires employees and gives orders and instructions to them (R. 63, 66); that his income from the business in 1945 was $20,000, the same as Fried's (R. 66); that on occasion he has referred to Fried as his partner (R. 67); that at other times he has refused permission to persons "to go in the plant" (R. 76); and that in the course of the search of the plant he authorized an

employee to remove various tools from the plant (R. 88).

Miss Berke, the firm's bookkeeper, testified that petitioner Neary hired her for the firm and that Fried and Neary had equal authority in the operation of the business (R. 117). Another employee referred to petitioners Fried and Neary as "the two bosses" (R. 206).

These facts permit the conclusion, we think, that Neary in fact is a partner with Fried in the operation of the business, but at the very least they demonstrate that Neary shared in the general management of the business with Fried. The employees regarded him as their "boss," and he exercised the functions which are ordinarily associated with such a position. At other times, Neary admittedly had withheld approval to persons seeking to go into the plant. The power to deny leave suggests also the power to grant it, as Neary did in this case. Quite plainly, Neary was not a mere employee or a mere sales manager as he testified. Light on the question whether he was a full-blown partner undoubtedly could have been given by petitioner Fried if he had seen fit to testify. Whether or not Neary was a partner, he was a ranking official of the firm who consented to the search and seizure without any troubling doubts in his own mind as to his power to do so. The courts below properly held, we submit, that Neary possessed ample authority to

permit the search and seizure to which he consented.

3. While Neary was accompanying the special agents through the plant, another agent was interrogating the firm's bookkeeper and he was shown some of the firm's purchase records (see R. 184, 191). Petitioners now argue (Pet. 17) that this was a search which preceded the signing of the consent form and that it was therefore illegal. Similarly, on the following day, two agents returned to the firm's office and requested the bookkeeper to accompany them to an F. B. I. accountant to explain certain entries in the books and the agents asked for any records of purchases. The bookkeeper gave them the firm's journal and accounts payable ledger (R. 115–117). Petitioners urge (Pet. 17–18) that this seizure was not authorized by the consent which had been given the previous day.

The argument as to both instances is incompatible with the facts found by Judge Rifkind. Both occurrences are parts of the entire transaction. The inquiry into the firm's books on September 17th was initiated while other agents were searching the plant. The inquiry and seizure on the following day quite plainly was the completion of the search. It was not an isolated transaction occurring after the culmination of the earlier search and seizure; it was an integral, contemporary part of the initial search and seizure. If, as Judge Rifkind determined, peti-

tioner Neary willingly and freely consented to the search and seizure in an effort to convince the agents that the firm had nothing to hide, there is no basis for saying that the consent operated only prospectively and only on September 17. Neary knew that an agent had been looking at the purchase records while he was with the agents in the plant (see R. 55–56). Notwithstanding this, he buttressed his earlier oral consent by signing the written consent form. Thus, at the very least he ratified what had been done. The consent form of course, did not give the agents carte blanche to search and seize at any time in the future, but it plainly authorized the search and seizure in the course of the transaction in which it was given. The fact that the agents did not discover two books until the following morning does not, we think, exclude those books from the consent which Neary gave.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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